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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1032 48

MINNIE E. NASH,

Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION,
THE STANLEY WORKS and
STANLEY BUILDING SPECIALTIES,

Respondents.

BRIEF OF RESPONDENT FLORIDA INDUSTRIAL COMMISSION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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CITATIONS TO OPINIONS BELOW

Respondent accepts those citations on pages 2–3 of the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was entered on October 11, 1966, R. 54; Appendix A of the Petition. Petitioner invoked jurisdiction in this Court by Petition for Certiorari pursuant to 28 U.S.C., Section 1257(3), instead of availing herself of the following remaining Florida Appellate Court remedies: 1) The filing of a Petition for Rehearing in the District Court of Appeal, pursuant to Florida Appellate Rule 3.14. 2) The filing of a request in the Florida District Court of Appeal that said court certify to the Florida Supreme Court that the federal question passed upon by its decision was one of great public interest and 3) Upon the issuance by the District Court of said certificate, the subsequent filing of a Petition for Writ of Certiorari in the Florida Supreme Court to review the decision of the District Court. Article V, Section 4(2) Florida Constitution, 26 F.S.A. 145; Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6). It is Respondent's contention that by Petitioner's failure to exhaust the aforementioned remedies this Court lacks jurisdiction of her Petition. More specifically, Respondent contends that the Florida District Court of Appeal was not (as contended on pages 10–11 of the Petition) the highest state court in which Petitioner could seek the enforcement of her federal constitutional rights, since that court was the Florida Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the Constitutional and Statutory Provisions presented on pages 4–5 of the Petition for Writ of Certiorari. In addition, however, Respondent adds the following

pertinent Constitutional and Statutory provisions:

Florida Constitution, Article V, Section 4, paragraph 2 (the identical language is also found in 31 F.S.A. Appellate Rules, Rule 2.1(a) (5)b):

". . .Appeals from district courts of appeal may be taken to the supreme court as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with the decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

31 F.S.A., Appellate Rules, rule 4.5(c) (6) :

"From District Court to Supreme Court. Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision."

31 F.S.A., Appellate Rules, Rule 3.14 Rehearing:

"a. Time For. Unless further time is allowed, re-

hearings must be applied for by petition in writing within 15 days after the filing of the decision or order of the Court."

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review the judgment of the District Court of Appeal of Florida, Third District, pursuant to 28 U.S.C., Section 1257(3), when such judgment was not rendered by the highest Florida Court, in which a decision could be had, since Petitioner failed to exhaust her further appellate remedies of Petition for Rehearing in the Florida District Court of Appeal, pursuant to Florida Appellate Rule 3.14, request for certification by the Florida District Court of Appeal to the Florida Supreme Court that the federal question passed upon by its decision was one of great public interest, and upon issuance by the District Court of Appeal of such certificate, Petition for Writ of Certiorari in the Florida Supreme Court, pursuant to Article V, Section 4(2), Florida Constitution, 26 F.S.A. 145; Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6)?

2. Under Article VI, clause 2, and the 14th Amendment, Section 1, United States Constitution, may a state disqualify a citizen of the United States from unemployment compensation benefits solely because that citizen has filed an unfair labor practice charge with the National Labor Relations Board under the National Labor Relations Act 29 U.S.C. 141, et seq., such

disqualification to begin on the date the unfair labor practice charge is filed and to continue for so long as it remains pending before the National Labor Relations Board?

STATEMENT OF THE CASE

Respondent accepts all portions of the "Statement of the Case" on pages 6–11 of the Petition except the statement in paragraph 5, page 10, thereof, that the District Court of Appeal of Florida, Third District, was "the highest state court in which Petitioner could seek enforcement of her federal constitutional rights." Respondent contends that the highest court in which such rights could be enforced was the Florida Supreme Court.

Respondent adds the following statements to the "Statement of the Case" appearing in the Petition:

Petitioner failed to file a Petition for Rehearing in the District Court of Appeal as authorized by Florida Appellate Rule 3.14. She further failed to file a request in the District Court for its certification to the Florida Supreme Court that the federal question passed upon by its decision was one of great public interest and further failed to file a Petition for Writ of Certiorari in the Florida Supreme Court, as authorized by Article V, Section 4(2) Florida Constitution, 26 F.S.A. 145; Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6).

ARGUMENT

QUESTION ONE RESTATED

1. Does this Court have jurisdiction to review the judgment of the District Court of Appeal of

Florida, Third District, pursuant to 28 U.S.C., Section 1257(3), when such judgment was not rendered by the highest Florida Court, in which a decision could be had, since Petitioner failed to exhaust her further appellate remedies of Petition for Rehearing in the Florida District Court of Appeal, pursuant to Florida Appellate Rule 3.14, request for certification by the Florida District Court of Appeal to the Florida Supreme Court that the federal question passed upon by its decision was one of great public interest, and upon issuance by the District Court of Appeal of such certificate, Petition for Writ of Certiorari in the Florida Supreme Court, pursuant to Article V, Section 4(2) Florida Constitution, 26 F.S.A. 145; Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6)?

Respondent respectfully submits that this question should be resolved in the negative.

Petitioner failed to exhaust her appellate remedies in the Florida District Court of Appeal by her failure to file a Petition for Rehearing in that Court, pursuant to Florida Appellate Rule 3.14.

Although the Florida Supreme Court has jurisdiction to review by certiorari any decision of a Florida District Court of Appeal, which such Court certifies to the Supreme Court passed upon a question of great public interest, pursuant to Article V, Section 4(2), Florida Constitution, 26 F.S.A. 145 Florida Appellate Rules 2.1(a) (5)b and 4.5(c) (6),Petitioner failed to file a request in the District Court for such certificate thereby precluding the vesting of any jurisdiction in the

Florida Supreme Court which would have occurred upon the issuance of a certificate and the subsequent filing of a Petition for Writ of Certiorari in the Florida Supreme Court.

In construing the authority granted to Florida District Courts of Appeal to issue such certificates, the Florida Supreme Court has held that jurisdiction vested in the Supreme Court upon such certification and the Supreme Court would not determine whether a District Court of Appeal had properly certified a decision as passing upon a question of great public interest. *Zirin v. Charles Pfizer Co.*, 128 So. 2d 594 (Fla. Sup. Ct. 1961), *Susco Car Rental System of Florida v. Leonard*, 112 So. 2d 832 (Fla. Sup. Ct. 1959). While it is true that the Supreme Court has also held that Article V, Section 4(2), Florida Constitution, does not require it to decide a question certified by a Florida District Court of Appeal to be of great public interest, it has also held that upon such certification the Supreme Court is not limited to a decision of the question certified but may consider the decision itself. *Zirin v. Charles Pfizer Co.*, supra; *State v. Cruz*, 189 So. 2d 882 (Fla. Sup. Ct. 1966).

In other words, Petitioner, by her inaction in failing to seek a certificate of great public interest from the District Court precluded certiorari review in the Supreme Court. Such review, while discretionary, could have afforded Petitioner the enforcement of her federal constitutional rights on all issues involved.

In *Dresner v. City of Tallahassee* (1963), 375 U.S. 136, this Court granted certiorari to review a judgment of a Florida Circuit Court affirming a municipal court conviction for violation of a city unlawful assembly ordinance over the

Petitioner's federal constitutional challenges invoking their rights under the 14th Amendment to the United States Constitution. The respondents resisted certiorari review on the identical ground relied on by respondent herein, namely, that the judgment was not rendered by the highest Florida Court in which a decision could be had. This Court, pursuant to 31 F.S.A. Appellate Rules, rule 4.61, certified to the Florida Supreme Court questions concerning whether any higher Florida Court had jurisdiction to review the Circuit Court's judgment and whether such higher court would have been empowered to fully consider the federal constitutional questions presented.

Accordingly, the Florida Supreme Court fully responded to the certified questions in its opinion in *Dresner v. City of Tallahassee*, 164 So. 2d 208 (Fla. Sup. Ct. 1964) stating that the Circuit Court judgment was first reviewable by the Florida District Court of Appeal, First District, by Petition for Writ of Certiorari, pursuant to Article V, Section 5(3), Florida Constitution, and then, if necessary, by the Florida Supreme Court. Although the Supreme Court did not discuss the particular provisions for certiorari review referred to by Respondent herein, namely, the issuance by the District Court of a certificate of great public interest, it did allude to certain other avenues of certiorari or appellate review available in the Supreme Court, pursuant to Article V, Section 4(2) Florida Constitution, which also provides for the vesting of certiorari jurisdiction upon issuance of the certificate.

On page 212 of its Opinion, the Florida Supreme Court stated:

"We contribute an additional observation regarding a possible review of the decision of the Florida District Court of Appeal if its jurisdiction had been properly invoked in the

instant case. Under Florida Constitutional provisions a decision of the District Court of Appeal is reviewable on certiorari granted by the Florida Supreme Court, in the event that such decision conflicts on the same point of law with a prior decision of the Supreme Court or another District Court of Appeal. . . *To this extent complete exhaustion of Florida's appeal process would comprehend ultimate consideration and disposition of a particular case by action of the Florida Supreme Court timely and properly invoked.*" (Emphasis added)

In the footnotes to pages 10–11 of the Petition for Writ of Certiorari, it is alleged that further state court appellate review was precluded by the entry by the District Court of Appeal of a *per curiam* denial of Petitioner's Petition for Certiorari. In support of this contention Petitioner cites these three Florida Supreme Court cases: *Armstrong v. City of Tampa*, 106 So. 2d 407 (Fla. Sup. Ct. 1958); *Miami Herald Publishing Company v. Brautigam*, 121 So. 2d 431 (Fla. Sup. Ct. 1960); 127 So. 2d 718 (Third D.C.A. Florida 1960) certiorari denied, (1962) 369 U.S. 821; *Page v. State*, 113 So. 2d 557 (Fla. Sup. Ct. 1959).

Respondent respectfully submits that none of these cases are applicable since all involved direct appeals to the Florida Supreme Court from Florida trial courts and the Supreme Court held that it lacked jurisdiction because the judgments did not directly pass on the validity of a state statute or construe a controlling provision of the Florida or Federal Constitutions. The court then transferred the appeals to the appropriate District Court of Appeal having jurisdiction, pursuant to Florida Appellate Rule 2.1(5) (d), 31 F. S. A.

At no time has Respondent contended that the Supreme Court had appellate jurisdiction. We have consistently maintained that the only review available to Petitioner was by

certiorari in the Supreme Court.

In further support of its contention that a *per curiam* decision by the District Court precluded review in the Supreme Court, Petitioner cites, in the footnotes to page 11 of her petition, the case of *Adderley v. Florida* (1966) -U. S.-, 87 Sup. Ct. 242, where Petitioners claimed rights under the 14th Amendment as precluding their conviction under a trespass statute, and the District Court of Appeal of Florida, First District, entered a *per curiam* affirmance of the conviction. Although the same appellate course was apparently pursued by the petitioners in both the *Adderley* case and in our case, by the filing of Petitions for Writ of Certiorari in this Court to review *per curiam* decisions of the District Court in lieu of exhaustion of certiorari review in the Florida Supreme Court, it does not appear from this court's opinion in the *Adderley* case that jurisdiction was challenged by the respondents as it was in the case of *Dresner v. City of Tallahassee*, supra. It is well settled that contentions not raised in opposition to a petition for certiorari will not be considered by this Court. *Wiener v. United States* (1958) 357 U. S. 349.

Since the jurisdictional issue was never in question in the *Adderley* case, such decision cannot be deemed to be controlling on the jurisdictional issues raised herein.

It is therefore, respectfully submitted that since this Court in the *Dresner* case specifically disposed of the identical jurisdictional question involved herein by certified question to the Florida Supreme Court, the *Dresner* case is controlling herein.

It is further submitted that nowhere in the cases cited by

Petitioner or in the applicable provisions of the Florida Constitution and Appellate Rules is there any support for their contention that the entry of a *per curiam* judgment or decision by the Florida District Court of Appeal precludes certiorari review by the Florida Supreme Court.

QUESTION TWO RESTATED

2. Under Article VI, clause 2, and the 14th Amendment, Section 1, United States Constitution, may a state disqualify a citizen of the United States from unemployment compensation benefits solely because that citizen has filed an unfair labor practice charge with the National Labor Relations Board under the National Labor Relations Act 29 U.S.C. 141, et seq., such disqualification to begin on the date the unfair labor practice charge is filed and to continue for so long as it remains pending before the National Labor Relations Board?

Respondent respectfully submits that this question be resolved in the affirmative.

Respondent recognizes that Petitioner, as a citizen of the United States, has been afforded the right to file an unfair labor practice charge with the National Labor Relations Board for reinstatement and back pay, pursuant to the provisions of the Labor Management Relations Act as well as her right to strike or engage in picketing activities. *Labor-Management Relations* Act, 29 U. S. C. A., Sections 160–163.

However, State unemployment compensation laws were enacted pursuant to the enactment of the Federal Social

Security Act of August 14, 1935. 42 U.S.C.A., Sections 301, 501, 601, 1103. State unemployment compensation statutes are designed to work closely with Federal legislation as part of a national plan to promote the social welfare. *81 C.J.S. Social Security and Public Welfare*, Section 80.

The constitutionality of State unemployment compensation statutes was long ago upheld by the U.S. Supreme Court in the case of *Carmichael v. So. Coal & Coke* (1937), 301 U.S. 495.

With regard to the authority of a State to choose the beneficiaries of unemployment compensation benefits, the Court said the following at pages 519–20 of the *Carmichael Decision:*

> "What we have said as to the validity of the subjects of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits, the legislature is not bound to occupy the whole field. It may strike at the evil where it is felt most. . . or where it is most practicable to deal with it, . . ."

Therefore, the disqualification of a claimant for benefits pursuant to labor dispute disqualification statutes of state unemployment compensation laws, such as our Section 443.06(4) F. S., is authorized as an exclusion determined by the legislature. Such disqualification normally occurs as a result of unemployment due to a "labor dispute" in active progress. The term "labor dispute" as used in the cited statute means any controversy concerning "terms or conditions of employment". *Meyer v. Fla. Ind. Comm.* (Fla. App. 1959) 117 So. 2d 216. In most cases a "labor dispute" in active progress is manifested by a strike, picketing or lockout.

See Section 443.06(2) (b) 1 F.S., which includes a strike and lockout within the definition of the phrase labor dispute. See, also: *Unemployment Compensation Comm., Territory of Alaska v. Aragon* (1946) 329 U. S. 143. However, both the First and Second District Courts of Appeal of Florida have held that disqualifications are proper under Section 443.06(4) F. S., where active progress of a labor dispute is manifested by the filing of N.L.R.B. charges for reinstatement and back pay. *Meyer v. Fla. Ind. Comm.*, supra; *Post Times Co. v. Turner*, (Fla. App. 1960) 123 So. 2d 359.

It is not logical nor reasonable to conclude that the Petitioner's constitutional rights would be violated when she is disqualified for benefits upon filing of the N.L.R.B. charge but not upon resort to the other remedies of strike action or picketing afforded her under the same Federal law.

Petitioner places much reliance upon this Court's decision in *Sherbert v. Verner* (1963) 374 U. S. 398, where it was held that the disqualification by the South Carolina Employment Security Commission of a claimant for receipt of unemployment compensation benefits because of her failure to accept suitable work on Saturdays for purely religious reasons was an abridgement of her right to the free exercise of her religion guaranteed by the 1st Amendment of the United States Constitution. Petitioner, on authority of the cited case, now urges this Court to rule that Petitioner's disqualification by Respondent Commission for the filing of her National Labor Relation Board charge constituted an abridgement of her right under the United States Constitution to inform the United States of a violation of its laws.

If such reasoning could be approved by this Court as the

basis for such a ruling, then it would seem that the entire Section 443.06(4) F. S. might be declared invalid on its face. However, nowhere in the Petition are any cases cited wherein any state labor dispute disqualification statute was invalidated and Respondent has not been able to find any. On the contrary, as stated above, the courts have consistently held that such activities as strike action and picketing on the part of a claimant would normally justify disqualification for unemployment compensation benefits, although this Court has declared picketing to be activity involving the exercise of freedom of speech and of the press guaranteed by the United States Constitution. *Senn v. Tile Layers Protective Union* (1937) 301 U. S. 468, 478; *Thornhill v. Alabama* (1940) 310 U. S. 88, 101–106; *A. F. L. v. Swing* (1940) 312 U. S. 321, 323–326.

The case of *in Re Quarles* (1895) 158 U. S. 532, also heavily relied on by Petitioner, is clearly inapplicable herein. In *Quarles* this Court approved the applicability of Section 5508 of the Revised Statutes for the punishment of a criminal conspiracy against a certain informer by those persons whom he informed against concerning their criminal violations of the Internal Revenue Laws of the United States. In its Opinion this Court emphasized both the duty of private citizens to furnish information to assist peace officers in prosecution of breaches of the peace of the United States and the rights of such citizens to have their information treated as a confidential and privileged communication and their persons protected from any conspiracy to injure, oppress, threaten or intimidate them.

In contrast to the facts in *Quarles*, our case involves alleged "information" furnished in a National Labor Relations

Board charge by Petitioner, to the United States government to secure redress of certain purely private rights, namely, her reinstatement in her job with the Respondent employers with back pay. Our case is also distinguishable from *Quarles* in that no public duty was performed by Petitioner to assist United States law enforcement officials to prosecute any violations of its criminal laws. Moreover, there is in our case neither the existence nor the allegation of any criminal conspiracy against Petitioner in the exercise of her rights, pursuant to Section 5508, R. S.

It is therefore submitted that the filing of Petitioner's unfair labor practice charge does not contemplate the "informing" of the United States of any violation of its laws as contemplated by the *Quarles* case.

CONCLUSION

It is therefore respectfully submitted that the authorities and decisions cited by Petitioner in her Petition for Writ of Certiorari failed to show jurisdiction in this Court and therefore, said Petition should be denied.

If this Court takes jurisdiction and grants Certiorari, it is respectfully urged that the decision of the Florida District Court of Appeal be affirmed on the constitutional question presented for the reasons stated above.

Respectfully submitted,

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and
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari was mailed first class, postage prepaid to Rutledge and Milledge, Attorneys for Petitioner, 601 Flagler Federal Building, Miami, Florida and to W. Reynolds Allen and Glenn L. Greene, Jr., Esqs,, Fowler, White, Collins, Gillen, Humkey and Trenam, 501 City National Bank Building, Miami, Florida, Attorneys for Respondents, The Stanley Works and Stanley Building Specialties, this 3d day of March, 1967.

PATRICK H. MEARS